U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0442 BLA

ROBERT E. CORNETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	DATE ISSUED: 05/19/2016
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Reconsideration of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Reconsideration (2010-BLA-05228) of Administrative Law Judge Lystra A. Harris, rendered on a

subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This claim, filed on January 28, 2009, is before the Board for the second time.

In her initial decision, the administrative law judge determined that claimant performed the work of a miner, credited claimant with twenty-five years of coal mine employment,[2] and found that employer was properly designated as the responsible operator. On the merits, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, and that claimant therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board affirmed the administrative law judge's findings that claimant was a miner, and that employer is the responsible operator. *Cornett v. Whitaker Coal Corp.*, BRB No. 12-0475 BLA, slip op. at 3-4 (May 2, 2013) (unpub.). However, the Board vacated the finding of complicated pneumoconiosis. *Id*. at 4-10. Regarding the x-ray evidence, pursuant to 20 C.F.R. §718.304(a), the Board affirmed the administrative law judge's determination that conflicting interpretations of an x-ray taken on July 23, 2009, were in equipoise, but vacated her findings that x-rays taken on July 16, 2008, January 14, 2009, and March 27, 2009, supported the existence of complicated pneumoconiosis. *Id*. at 6-7. Regarding the medical opinion evidence, pursuant to 20 C.F.R. §718.304(c), the Board vacated the administrative law judge's decision to credit Dr. Baker's diagnosis of complicated pneumoconiosis as supported by the x-ray evidence, in light of the Board's decision to vacate the finding that the x-ray evidence established complicated pneumoconiosis.[3] *Id*. at 8. The Board instructed the administrative law judge, on remand, to reconsider the evidence of complicated

[1] Claimant's previous claim, filed on October 2, 2001, was denied by the district director on February 25, 2003, because claimant failed to establish that he suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] Claimant's coal mine employment was in Kentucky and Tennessee. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] The Board affirmed the administrative law judge's determination to discount Dr. Vuskovich's medical opinion, that tuberculosis was the cause of claimant's x-ray abnormalities, because the opinion was not well-reasoned or supported by the evidence. *Cornett v. Whitaker Coal Corp.*, BRB No. 12-0475 BLA, slip op. at 8-10 (May 2, 2013) (unpub.).

pneumoconiosis and, if she determined that claimant did not establish its existence, to consider whether claimant could invoke the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[4] *Id*. at 10.

On remand, the administrative law judge initially denied benefits, in a Decision and Order issued on April 15, 2015. Pursuant to 20 C.F.R. §718.304(a), the administrative law judge determined that the weight of the readings of the March 27, 2009 x-ray was positive for complicated pneumoconiosis, but that the readings of the other three x-rays were in equipoise, and that the x-ray evidence therefore failed to establish complicated pneumoconiosis. Pursuant to 20 C.F.R. §718.304(c), the administrative law judge found that Dr. Baker's opinion that claimant has complicated pneumoconiosis was not well-reasoned. The administrative law judge therefore found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Additionally, the administrative law judge found that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and therefore failed to invoke the Section 411(c)(4) presumption, and failed to establish an essential element of entitlement under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

Claimant moved for reconsideration, which the administrative law judge granted in a Decision and Order Awarding Benefits on Reconsideration issued on June 3, 2015. The administrative law judge reassessed the x-ray evidence pursuant to 20 C.F.R. §718.304(a), after determining that she should have "more fully addressed the . . . physicians' comments associated with their [x-ray] interpretations" when determining the weight to accord their interpretations. Decision and Order on Reconsideration at 3. Addressing the physicians' comments suggesting alternative diagnoses for the opacities seen on claimant's x-rays, the administrative law judge discounted Dr. Scott's negative reading of the July 16, 2008 x-ray and Dr. Wheeler's negative reading of the January 14, 2009 x-ray, and thus found that both of those x-rays were positive for complicated pneumoconiosis. The administrative law judge's reassessment did not affect her previous determination that the March 27, 2009 x-ray was also positive for complicated pneumoconiosis. Thus, having determined that three of the four x-rays were positive for complicated pneumoconiosis, the administrative law judge found that the weight of the x-ray evidence established the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a). The administrative law judge again found that the medical opinion evidence and other evidence did not establish complicated pneumoconiosis, pursuant to

[4] If a miner has fifteen or more years of underground or substantially similar coal mine employment, and has a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305.

20 C.F.R. §718.304(c), but determined after weighing all of the evidence that claimant established the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304. She also found that claimant's complicated pneumoconiosis arose from his coal mine employment, pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits.[5]

On appeal, employer argues that the administrative law judge erred in her analysis of the x-ray evidence and other evidence in finding complicated pneumoconiosis established. Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the award of benefits. Employer has filed a reply brief, reiterating its arguments on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989);*Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when

[5] The administrative law judge did not make a finding pursuant to 20 C.F.R. §725.309. Employer does not challenge this aspect of the administrative law judge's decision, and any error in failing to render such a finding in this case is harmless. The administrative law judge's finding that claimant is entitled to the irrebuttable presumption at 20 C.F.R. §718.304 necessarily establishes total disability, the element of entitlement that claimant failed to establish in his prior claim. *See* 20 C.F.R. §§718.204(b)(1), 725.309(c)(3); Director's Exhibit 1.

diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

Employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a). Specifically, employer argues that the administrative law judge erred in weighing the readings of the x-rays taken on July 16, 2008, January 14, 2009, and March 27, 2009.[6] Employer's Brief at 11-17. Thus, we begin our analysis by summarizing the interpretations of those x-rays.[7]

July 16, 2008 x-ray

Dr. Miller diagnosed complicated pneumoconiosis after identifying a 2-centimeter x 1.5-centimeter, Category-A large opacity, and smaller opacities "compatible with pneumoconiosis." Director's Exhibit 23 at 5-6. Dr. Scott, in contrast, indicated that he saw no large opacities consistent with pneumoconiosis, but noted a 2-centimeter mass and observed that he could not rule out cancer. Director's Exhibit 26 at 2. Dr. Scott concluded that the smaller opacities were not symmetrical and thus were "not typical" of silicosis or pneumoconiosis. *Id.* Instead, Dr. Scott noted, "other diagnoses such as sarcoid, [tuberculosis], atypical [tuberculosis] and histoplasmosis should be considered[.]" *Id.*

January 14, 2009 x-ray

Dr. Alexander read the x-ray as showing "[b]ilateral upper zone large opacities with a summed diameter of less than 50 mm indicating complicated [pneumoconiosis], category A." Director's Exhibit 23 at 12. Dr. Wheeler interpreted the same x-ray as

[6] As noted above, the Board previously affirmed the administrative law judge's finding that the interpretations of the July 23, 2009 x-ray were in equipoise. *Cornett*, slip op. at 7 n.5.

[7] As was summarized by the administrative law judge, with the exception of Dr. Baker, who is a B reader, all of the doctors who provided interpretations for the three x-rays at issue in this appeal are dually-qualified as B readers and Board-certified radiologists.

showing a 6-centimeter mass and a 2-centimeter mass, which he concluded were compatible with histoplasmosis or tuberculosis, although he believed histoplasmosis was more likely. Director's Exhibit 29 at 3. Dr. Wheeler did not diagnose complicated or simple pneumoconiosis, reasoning that the "nodular infiltrates" seen were compatible with granulomatous disease, histoplasmosis, or tuberculosis. *Id.* Although he acknowledged that pneumoconiosis could have caused some of the small nodules, he concluded that "granulomatous disease is more likely," in light of the nodules' location and "pleural involvement." *Id.*

March 27, 2009 x-ray

Dr. Baker interpreted the x-ray as showing a Category-B large opacity and progressive massive fibrosis. Director's Exhibit 18 at 1, 15-17. Dr. Alexander read the x-ray as showing "[l]arge opacities in right upper zone . . . and in left apex with summed diameter of 40 mm [compatible with] category A complicated [pneumoconiosis]." Director's Exhibit 25 at 2. Dr. Wheeler, however, did not diagnose complicated or simple pneumoconiosis. Although he identified a 4- or 5-centimeter mass in claimant's right upper lung and lower apex, he concluded that it was not a "large opacity of [pneumoconiosis] because it involves pleura and background nodules are low profusion." Director's Exhibit 22 at 3. Instead, Dr. Wheeler noted that the mass was "compatible with conglomerate granulomatous disease: mycobacterium avium complex . . . or histoplasmosis more likely than [tuberculosis]." *Id.* In Dr. Wheeler's view, other "nodular infiltrates" or nodules seen were compatible with granulomatous disease or histoplasmosis. *Id.*

In evaluating the physicians' opinions, the administrative law judge began her analysis by observing that it was permissible for her to discredit an x-ray interpretation that is negative for complicated pneumoconiosis and presents "alternative etiologies" for any large opacities, if the record contains no evidence of the suggested alternatives. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24 BLR 2-269, 2-287 (4th Cir. 2010); *see also Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order on Reconsideration at 3-4. The administrative law judge noted that Drs. Scott and Wheeler both provided alternative explanations for the large opacities they saw in their readings: cancer, in Dr. Scott's case, and histoplasmosis, in both of Dr. Wheeler's readings. Decision and Order on Reconsideration at 4-5. The administrative law judge then determined that the record contained no evidence that claimant had ever been diagnosed with, or treated for, cancer or histoplasmosis. *Id.* Accordingly, the administrative law judge discounted Dr. Scott's negative interpretation of the July 16, 2008 x-ray, and Dr. Wheeler's negative interpretations of the January 14, 2009 and March 27, 2009 x-rays, assigning them less weight than the positive interpretations of Drs. Miller and Alexander. *See Cox*, 602 F.3d at 287, 24 BLR at 2-287; Decision and Order on Reconsideration at 4-5. Consequently, the administrative law

judge found that all three x-rays were positive for complicated pneumoconiosis, and that the weight of the x-ray evidence established complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a). Decision and Order on Reconsideration at 5.

Employer notes that in the previous appeal, the Board held that the administrative law judge failed to adequately explain her reasons for discounting Dr. Scott's negative reading, and that substantial evidence did not support her finding that Dr. Wheeler's readings were "equivocal," given that Dr. Wheeler "definitively stated that the x-rays were negative for large opacities of complicated pneumoconiosis." *Cornett*, slip op. at 6-7; Employer's Brief at 13-15. Employer argues that the administrative law judge, on remand, erred by reinstating the same improper reasons for discrediting the x-ray readings of Drs. Scott and Wheeler. Employer's Brief at 13-16. We disagree.

In the case of Dr. Scott's negative reading of the July 16, 2008 x-ray, the Board previously held only that the administrative law judge "failed to explain" why she discredited it. *Cornett*, slip op. at 6. Moreover, that error was in regard to Dr. Scott's comments on the etiology of the small opacities seen on the x-ray. *Id.* On remand, and upon reconsideration, the administrative law judge focused on Dr. Scott's suggestion that a 2-centimeter mass could be cancer, and explained that she discredited Dr. Scott's interpretation because there was no evidence that claimant had ever been diagnosed with or treated for cancer. Decision and Order on Reconsideration at 4-5; Director's Exhibit 26 at 2. As for Dr. Wheeler's negative interpretations of the January 14, 2009 and March 27, 2009 x-rays, the administrative law judge did not again find them to be equivocal, but instead discredited them as "speculative," because there was no evidence in the record to support Dr. Wheeler's opinion that histoplasmosis might be the cause of the large opacities. Decision and Order on Reconsideration at 4-5; Director's Exhibits 22 at 2; 29 at 2. In fact, the administrative law judge noted that claimant tested negative for histoplasmosis in January 2011. Decision and Order on Reconsideration at 4 n.6; Claimant's Exhibit 2.

In sum, the administrative law judge permissibly determined that the record did not support the alternative etiologies that Drs. Scott and Wheeler offered to explain the large opacities seen on claimant's x-rays, and reasonably found that their negative interpretations of the three x-rays at issue were therefore entitled to less weight than the positive interpretations of Drs. Miller and Alexander.[8] *See Cox*, 602 F.3d at 287, 24 BLR

[8] We reject employer's argument that the administrative law judge erred by failing to consider claimant's treatment records, which, in employer's view, support the negative x-ray interpretations of Drs. Scott and Wheeler. Employer's Brief at 9-12. Employer asserts that "[t]he record from [claimant's] original claim establishes that claimant did not have complicated pneumoconiosis," and cites tests and x-rays from 1999 that it believes support tuberculosis or granulomatous disease as explanations for the scarring seen on

at 2-287; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. We therefore affirm the administrative law judge's determination that the July 16, 2008, January 14, 2009, and March 27, 2009 x-rays weighed in favor of the existence of complicated pneumoconiosis, and that the x-ray evidence overall established complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a).[9] Decision and Order on Reconsideration at 5.

Finally, we reject employer's contention that the administrative law judge erred by ignoring evidence that claimant is not totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2), when she found that claimant established the existence of complicated pneumoconiosis. Employer's Brief at 17-20. This argument lacks merit. Claimant is not required to establish that he has a disabling respiratory impairment in order to establish complicated pneumoconiosis under the

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claimant's x-rays. Employer's Brief at 9-11. Employer, however, has not explained how further analysis of that evidence would have changed the administrative law judge's finding that the x-ray evidence established complicated pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Specifically, the old evidence cited by employer would not affect the administrative law judge's decision to discredit the x-ray readings of Drs. Scott and Wheeler because there was no evidence in the record to support their alternative explanations of cancer and histoplasmosis. Decision and Order on Reconsideration at 4-5. Further, as was discussed, *supra*, n.3, the Board previously affirmed the administrative law judge's decision to discount Dr. Vuskovich's opinion that claimant's treatment records from the late 1990s reflected that tuberculosis was the cause of the abnormalities seen on claimant's x-rays. *Cornett*, slip op. at 8-10.

[9] Employer argues that the administrative law judge erred in giving "some weight" to Dr. Baker's reading of the March 27, 2009 x-ray, when Dr. Baker is not as highly qualified as the other physicians who read claimant's x-rays. Decision and Order on Remand at 5; Employer's Brief at 16-17. Employer notes that the administrative law judge previously found that, since Dr. Baker is qualified as a B reader only, his x-ray reading merited "less weight" than those of Drs. Alexander and Wheeler, and that the Board's prior decision therefore held that the administrative law judge "failed to explain" why she combined Dr. Baker's reading with that of Dr. Alexander to find that the x-ray was positive. *Cornett*, slip op. at 7 n.4; Employer's Brief at 16. Because the administrative law judge, on remand, provided a valid reason for according less weight to Dr. Wheeler's negative reading of that x-ray than to Dr. Alexander's positive reading, we need not address this argument. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

criteria set forth in the Act.[10] *See* 30 U.S.C. §921(c)(3); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 n.4, 3 BLR 2-36, 2-38 n.4 (1976); *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 257-58, 22 BLR 2-93, 2-102-05 (4th Cir. 2000).

In conclusion, we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant established the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304. We also affirm the administrative law judge's unchallenged finding that claimant's complicated pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983); Decision and Order on Reconsideration at 6. We therefore affirm the award of benefits.

[10] Specifically, where a miner invokes Section 411(c)(3), he is entitled to "an irrebuttable presumption that he is totally disabled due to pneumoconiosis." 30 U.S.C. §921(c)(3). Further, the Director notes that the Act permits a claimant who continues to work as a miner to receive benefits, if the claimant has established entitlement by proving that he has complicated pneumoconiosis. 30 U.S.C. §923(d); 20 C.F.R. §725.504(a)(1), (b); Director's Brief at 11.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Reconsideration is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge